No. (1)

Supreme Court, U.S.
FILED

In The

Supreme Court of the United States

APR 29 1998

OFFICE OF THE CLERK

October Term, 1997

B. C. ROGERS PROCESSORS, INC., B. C. ROGERS POULTRY, INC., CHOCTAW MAID FARMS, INC., FOREST PACKING COMPANY, INC., MARSHALL DURBIN, INC., MARSHALL DURBIN FOOD CORPORATION, MARSHALL DURBIN POULTRY, INC., MARSHALL DURBIN OF TUPELO, INC. and MOHAWK PACKING COMPANY,

Petitioners,

vs.

THE BOC GROUP, INC., LIQUID AIR CORPORATION and LIQUID CARBONIC INDUSTRIES CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in light of this Court's ruling in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, the Court of Appeals erred in affirming the decision of the United States District Court for the Middle District of Florida to retain these cases for trial, over Petitioners' timely objection, when the cases had been transferred to that district by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings, pursuant 28 U.S.C. § 1407(a).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following were parties to the action below: Foster Poultry Farms Company, McCarty Farms, Inc., and McCarty Foods, Inc. Foster Poultry Farms Company, a California corporation, has not joined in this Petition, because Foster Poultry filed its individual action in the United States District Court for the Middle District of Florida after the Judicial Panel on Multidistrict Litigation consolidated all of the cases in that district for pretrial proceedings. Foster Poultry would have tried its case in the Middle District of Florida, unless the district court transferred it pursuant to 28 U.S.C. § 1404(a). McCarty Farms and McCarty Foods are not parties to this proceeding, because they have reached a settlement with Respondents.

Parent companies of the parties are as follows: Liquid Air Corporation is a wholly owned subsidiary of Air Liquide America Corporation, which is in turn a wholly owned subsidiary of Air Liquide, S.A. (France); Liquid Carbonic Industries Corporation is a wholly owned subsidiary of Praxair, Inc.; BOC Group, Inc. (a wholly owned subsidiary of BOC Group PLC (UK). McCarty Foods, Inc. and McCarty Farms Inc. are wholly owned subsidiaries of Tyson Foods, Inc. None of the other parties to this action have either parent companies or nonwholly owned subsidiaries which are not themselves parties to the action.

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Petitioners B. C. Rogers Processors, Inc., B. C. Rogers Poultry, Inc., Choctaw Maid Farms, Inc., Forest Packing Company, Inc., Marshall Durbin, Inc., Marshall Durbin Food Corporation, Marshall Durbin Poultry, Inc., Marshall Durbin of Tupelo, Inc., and Mohawk Packing Company respectfully petition this Court to issue a writ of certiorari to review the January 29, 1998 judgment of the United States Court of Appeals for the Eleventh Circuit in favor of Respondents The BOC Group, Inc., Liquid Air Corporation, and Liquid Carbonic Industries Corporation, in *State of Florida, et al. v. Liquid Air Corporation, et al.*

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the United States District Court for the Middle District of Florida without opinion. This per curiam affirmance, *sub nom State of Florida v. Liquid Air*, is reported at 136 F.3d 139. The unpublished orders of the United States District Court for the Middle District of Florida (Peter Hill Beer, J., sitting by designation) and of the Judicial Panel on Multidistrict Litigation are included in the appendix to this petition, along with the order of the Eleventh Circuit denying Petitioners' Petition for Writ of Mandamus. The trial judge entered no written opinions in connection with any of the issues raised in the Petition. Excerpts from the transcript of the February 6, 1996 hearing on Petitioner's motion for suggestion of remand are included in the appendix in lieu of a written opinion.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on January 29, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

The statutory provision involved in this petition is 28 U.S.C. § 1407(a) which provides in pertinent part:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

Rule 14(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, which provides:

> (b) Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C.§ 1404(a) or 28 U.S.C. § 1406. In the event that the transferee judge so transfers an action under 28 U.S.C. § 1404(a) or 1406, no further action of

the Panel shall be necessary to authorize further proceedings including trial. Actions that were originally filed in the transferee district require no action by the panel to be reassigned to another judge in the transferee district at the conclusion of the coordinated or consolidated pretrial proceedings affecting these actions.

STATEMENT OF THE CASE

A. Introduction

This is an antitrust action, brought pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1, by users of bulk liquid carbon dioxide (CO_2). The Respondents are the major producers of that product, BOC (which also does business under the name "Airco"), Liquid Air (which at times did business under the name "Cardox") and Liquid Carbonic Corporation. Petitioners, all of whom are end users of CO_2, alleged that these producers conspired to allocate customers among themselves by aggressively competing for sales to locations which were not currently buying CO_2 from any of them, but refraining from competition among themselves on the basis of price once one of the defendants had secured the business of a CO_2 user. In order to disguise the conspiracy, it is alleged that Respondents developed almost identical price schedules, and directed their front line sales people that they were only to bid a schedule price to existing customers of the other defendants. Because the schedule price was higher than the realistic market price, the net result of the agreement was that each producer was able to safely raise its prices to its existing customers without fear of having the price undercut by another producer, so long as the current price was less than the schedule price. This agreement, it is alleged, was made at the highest levels of these companies in 1968, and the Respondents continued to operate according to the agreement at least through mid-1992.

For the sake of convenience, Petitioners B. C. Rogers Processors, Inc., B. C. Rogers Poultry, Inc., Choctaw Maid Farms, Inc., Forest Packing Company, Inc., Marshall Durbin, Inc., Marshall Durbin Food Corporation, Marshall Durbin Poultry, Inc., and Marshall Durbin of Tupelo, Inc., all of which are poultry processors with plants located in the State of Mississippi, will be referred to as the Mississippi Plaintiffs. Mohawk Packing Company, a meat packing company with plants located in the State of California, will be referred to as the California Plaintiff.

B. Prior Proceedings In This Case

1. Factual Background

Numerous cases in which customer allocation and price fixing claims were asserted against Respondents were filed in district courts around the country beginning in approximately April, 1992, including an action by the State of Florida, which was filed in the Middle District of Florida. The various cases were transferred to the United States District Court for the Middle District of Florida by the Judicial Panel on Multidistrict Litigation. The Florida district court subsequently certified a nationwide class of users of CO_2. The Mississippi Plaintiffs opted out of the class and filed an individual action in the United States District Court for the Southern District of Mississippi in September, 1994. The California Plaintiff, Mohawk Packing Company, filed its individual suit in the Northern District of California on July 21, 1993. The Mississippi and California actions were transferred to the Middle District of Florida as tag-along actions by order of the Judicial Panel pursuant to 28 U.S.C. § 1407(a). Transfer was ordered for consolidated or coordinated pretrial proceedings only.

2. The Decision of the District Court

Petitioners seek review by this Court of the district court's decision to keep these cases in the Middle District of Florida for trial, and the court of appeals' subsequent affirmance of that decision. Although no order transferring the actions to the Middle District of Florida for all purposes was ever entered, the court set the cases for consolidated trial in that district commencing on February 5, 1996. At the time the trial setting was made, there were five groups of plaintiffs — the certified class of CO_2 users, and an assortment of individual cases, including the Mississippi Plaintiffs, the California Plaintiffs, the State of Florida, and a large group of plaintiffs headed by Anheuser-Busch[1]. On the appointed day for trial, Respondents announced that they had settled with the class, the Anheuser-Busch group, and the State of Florida. Upon learning that the Mississippi and California Plaintiffs had not yet settled, the district judge announced his intention to remand those cases to Mississippi and California for trial. (App. F, 12a-13a).

Following that announcement, counsel for BOC met with the judge outside the presence of any attorneys representing Petitioners. In that meeting, the district judge has admitted that counsel for BOC convinced him

> That a great amount of money was being paid in the settlement, a huge amount of money had been expended in connection with the litigation process, and the one thing that the defendant required in terms of the management of the matter at that point in time was that it be — that it all be resolved.

---

1. In the transcript of the February 6, 1996 hearing which is included in the Appendix to this Petition, the Anheuser Busch group of opt-out plaintiffs is referred to as the Freeman plaintiffs, because they were represented by the Chicago firm of Freeman, Freeman & Salzman.

> There wasn't any — there wasn't even a discussion about venue or anything else, it was simply that it all be resolved, i.e., that this be the forum, that this be the place of resolution of the balance of the case. That was the entirety of their contentions to me.
>
> And I thought that that was okay under the circumstances. My feeling was well, if I can bring that to the process, okay, I will do it.

(App. F, 16a).

The district judge then announced his intention to keep the remaining cases in the Middle District of Florida for trial. Petitioners filed a motion for suggestion of remand, asking that the district judge notify the Judicial Panel that pretrial proceedings were completed and that the cases were ready to be remanded. The district judge denied this motion, stating on the record that his denial was based on the commitment he had made to defense counsel to resolve all of the cases in Florida. (App. F, 16a-17a & 19a-20a). Petitioners sought review of the order denying their motion for suggestion of remand by Petition for Writ of Mandamus to the United States Court of Appeals for the Eleventh Circuit and by petitioning the Judicial Panel on Multidistrict Litigation to remand the cases. The Eleventh Circuit denied Plaintiffs' petition, stating that the issues raised could be reviewed on appeal, if necessary. (App. D, 7a-8a). The Judicial Panel on Multidistrict Litigation issued no response to the petition for remand until after the jury had returned a verdict against Petitioners, and then denied the petition as moot. (App. B, 3a-4a).

The case went to trial on March 5, 1996. After two weeks of trial, the jury returned a verdict for the defendants. Petitioners

filed a Motion for New Trial, again raising the issue of the trial court's authority to keep these cases in Florida for trial. (App. G, 21a-22a). The trial court denied the motion, without written opinion, by order dated April 30, 1996. (App. C, 5a-6a).

3. The Decision of the Eleventh Circuit

Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit, contending, *inter alia*, that the district judge had erred in keeping the cases for trial. By letter dated December 29, 1997, while the appeal was pending, Petitioners informed the Eleventh Circuit of the pendency before the United States Supreme Court of *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*. Petitioners requested that the Court of Appeals withhold its ruling on their appeal until after this Court rendered its decision in *Lexecon*. (App. H, 38a). The case was set for oral argument on January 15, 1998. During the course of that argument, the panel focused entirely on the issue of the trial court's refusal to remand and whether that was not simply a venue issue. On January 29, 1998, the Court entered its one word affirmance, without any explanation of why Petitioner's appeal was without merit or of why the Court would not wait for this Court's opinion in *Lexecon* . The judgment of the Eleventh Circuit was issued as mandate on February 27, 1998. This Court handed down its opinion in *Lexecon* on March 3, 1998. Petitioners did not seek review of the panel's January 29, 1998 decision or request rehearing en banc because no opinion was issued and such petitions are not favored under these circumstances, their being no new issues. F.R.A.P. Rules 35 and 40.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED PURSUANT TO RULE 10 BECAUSE THE DECISION OF THE COURT OF APPEALS ADDRESSES AN IMPORTANT FEDERAL QUESTION IN A MANNER INCONSISTENT WITH A RELEVANT DECISION OF THIS COURT.

In the instant action, the United States Court of Appeals for the Eleventh Circuit has ruled in a manner that is inconsistent with this Court's opinion in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, __ U.S. __, 118 S. Ct. 956, __ L. Ed. 2d __ (1998). Specifically, the Court of Appeals, after concentrating oral argument of this case on whether the trial court had erred in retaining these cases for trial, apparently ruled that there was no error in the trial court's refusal to even consider Plaintiff's motion for suggestion of remand. Unfortunately, the court of appeals did not consider this issue worthy of an opinion. Petitioner's cases were on appeal at the time that *Lexecon* was under consideration by this Court.

In *Lexecon*, the Supreme Court held that once a case had been transferred to a district court for consolidated or coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407(a), as these cases were, the transferee court had no authority or jurisdiction to simply keep the cases for trial. In fact, the Court held that the section 1407(a) transferee court could not even transfer the cases to itself pursuant to 28 U.S.C. § 1404(a), but had to comply with section 1407(a), which mandates that

> Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was

> transferred unless it shall have been previously terminated.

This Court read this provision as imposing on the Panel the "responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel's Rule 14(b)," which implied that the trial court had such power. *Lexecon*, __ U.S. __, 118 S. Ct. 956, 964, __ L. Ed. 2d __ (1998).

In the instant action, Petitioners timely raised the issue of the district court's authority to retain these cases for trial. Prior to trial, Petitioners requested the trial judge to remand, sought review of the denial of this motion by petition for writ of mandamus in the Eleventh Circuit, and filed a petition before the Judicial Panel on Multidistrict Litigation; all to no avail. The district court never entered an order transferring the cases for all purposes; and had no authority or jurisdiction to do so. In fact, the district judge decided the issue of where the cases would be tried based upon a commitment he made to the Respondents in an attempt to help them with settlement negotiations. (App. F, 16a-17a). Petitioners were not informed until after the fact that this conference was to take place or that the issue of where the cases would be tried would be discussed. On February 6, 1996, Petitioners filed their motion for suggestion of remand, before the cases had been called for trial, and at a time when, in the district judge's own words, it was obvious that a continuance of some duration would be necessary to allow the remaining plaintiffs to prepare to take over roles that had been assigned to counsel for the class, for the State of Florida and for the large group of opt-out plaintiffs. (App. F, 17a). In the motion for suggestion of remand, Petitioners argued that the trial court did not have the authority to simply keep these cases for trial, but had to notify the Judicial Panel that pretrial proceedings were completed and the cases were ready

for remand. The district judge denied this motion, stating in open court that the basis of his denial was his desire to satisfy Respondents' request that the entire matter be resolved there and then. (App. F, 16a-17a). The judge never addressed the issue whether he had the authority to simply order the cases to trial in the Middle District of Florida. He stated no findings of fact and no legal reasoning for his decision to retain the cases for trial. He simply allowed Petitioners to make a record of what had occurred the day before, stated that he had decided to keep the cases in Florida to help with the settlement process, and asked if there was anything he needed to sign to speed the plaintiffs on their way to the Eleventh Circuit with their petition for writ of mandamus. (App. F, 18a-19a). Regardless of the reasoning, or lack thereof, behind the district court's denial of the motion, it is clear that he was attempting to exercise discretion which this Court's opinion in *Lexecon* makes clear that he did not have. As this Court stated, "the mandatory 'shall' normally creates an obligation impervious to judicial discretion." *Lexecon*, 118 S. Ct. at 962.

Petitioners sought review of this decision by Petition for Writ of Mandamus to the Eleventh Circuit. That Court denied the Petition, stating that the issue could be addressed on direct appeal if necessary. (App. D, 7a-8a). Following entry of judgment against Petitioners, they filed a motion for new trial, once again raising the issue of the trial court's authority to order the cases to trial in Florida. (App. G, 21a-22a). This motion was denied without opinion. (App. C, 5a-6a). On appeal, Petitioners asserted that the trial court had erred by retaining the cases for trial in violation of section 1407(a) and by denying them a fair hearing on their motion for suggestion of remand. The Eleventh Circuit entered its order affirming the lower court's decision, without opinion. (App. A).

By the time this Court entered its opinion in *Lexecon* on March 3, 1998, the time allowed for petitioning the Eleventh Circuit for rehearing of its January 29, 1998 decision had elapsed. In fact, the decision had been issued as mandate, leaving the Eleventh Circuit arguably without jurisdiction to entertain a petition for rehearing.

Petitioners have raised this issue five separate times before three different judicial bodies. None of them has yet addressed the issue in any fashion, other than to enter an order denying the requested relief. The holding of this Court in *Lexecon* directly supports the argument that Petitioners have made repeatedly in the courts below.

Issuance of a writ of certiorari is appropriate to correct the erroneous ruling of the Court of Appeals, which is in direct conflict with this Court's holding in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*. This Court should grant *certiorari* in this case and summarily reverse the judgment entered against Petitioners by the United States District Court for the Middle District of Florida and affirmed, without opinion, by the United States Court of Appeals for the Eleventh Circuit. In the alternative, this Court should remand this case to the Eleventh Circuit, with instruction that it reconsider its ruling in light of this Court's opinion in *Lexecon*.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 29, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2704

D.C. Docket No. 92-MD-940-CIV-ORL-3L23

IN RE:

CARBON DIOXIDE INDUSTRY ANTITRUST LITIGATION, STATE OF FLORIDA, ex rel., et al.,

Plaintiffs.

FOSTER POULTRY FARMS and MOHAWK PACKING COMPANY, B.C. ROGERS PROCESSORS, INC., et al.,

Plaintiffs-Appellants,

versus

LIQUID AIR CORP., et al.

Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida
(January 29, 1998)

Before TJOFLAT and HULL, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.1.[1]

"Costs taxed against plaintiffs-appellants."

Entered: January 29, 1998
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 2/27/98

---

1. 11th Cir. R. 36-1 provides:

When the court determines any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION DENYING MOTION AS MOOT FILED APRIL 15, 1996

DOCKET NO. 940

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE CARBON DIOXIDE INDUSTRY ANTITRUST LITIGATION

B.C. Rogers Processing, Inc., et al. v. BOC Group, Inc., et al., M.D. Florida, C.A. No. 6:93-965 (S.D. Mississippi, C.A. No. 3:93-598)

BEFORE JOHN F. NANGLE, CHAIRMAN, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS AND LOUIS C. BECHTLE, JUDGES OF THE PANEL

ORDER DENYING MOTION AS MOOT

On February 15, 1995, plaintiffs in the above-captiond action (*Rogers*) moved the Panel, pursuant to 28 U.S.C. § 1407, for an order i) remanding *Rogers* from the Middle District of Florida to the Southern District of Mississippi, and ii) staying *Rogers* until thirty days after the Panel resolved the remand motion. Trial of *Rogers* commenced in the Middle District of Florida on March 5, 1996. On March 21, 1996, jury verdicts were returned in favor of the defendants and judgment was entered.

Appendix B

ACCORDINGLY, IT IS ORDERED that the motion for remand, pursuant to 28 U.S.C. §1407, be, and the same hereby is, DENIED as MOOT.

FOR THE PANEL:

s/ John F. Nangle
John F. Nangle
Chairman

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, FILED APRIL 30, 1996

M.D.L.

NO. 940

JUDGE PETER BEER

IN RE CARBON DIOXIDE
ANTITRUST LITIGATION

ORDER

Before the Court are the following motions filed by the Mississippi and California Plaintiffs:

1) Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial,

2) Supplemental Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial,

3) Motion to Alter or Amend Judgment, and

4) Motion for Review of Clerk's Taxation of Costs.

The Court, after considering the briefs of record makes the following rulings:

IT IS ORDERED that the Plaintiffs' Motion for Judgment as a Matter of Law or, in the Alternative for a New Trial is hereby DENIED.

Appendix C

The Plaintiffs' Supplemental Motion for Judgment as a Matter of Law or, in the Alternative for a New Trial is also DENIED.

The Motion to Alter or Amend Judgment is DENIED insofar as it seeks to amend the judgment by deleting that portion of the judgment which awards defendants their costs. The Court reserves ruling on the Motion for Review of Clerk's Taxation of Costs at this time.

New Orleans, Louisiana this 30th day of April, 1996.

s/ Peter Beer
Peter Beer
United States District Judge

APPENDIX D — ORDER DENYING PETITION FOR WRIT OF MANDAMUS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 23, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-2179

IN RE:

B.C. ROGERS PROCESSORS, INC., B.C. ROGERS POULTRY, INC., McCARTY FARMS, INC., McCARTY FOODS, INC., MARSHALL DURBIN, INC., ET AL.,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

BEFORE: BLACK, CARNES and BARKETT, Circuit Judges.

BY THE COURT:

In this petition for writ of mandamus, petitioners ask us to direct the district court to remand this case to the Southern District of Mississippi and the Northern District of California pursuant to 28 U.S.C. § 1407 (a). We deny the petition for writ of mandamus. "Mandamus . . . is an extraordinary remedy reserved for extraordinary situations . . . [,]" *U.S. v. Coy,* 19 F.3d 629 (11th Cir. 1994), and mandamus is not the appropriate remedy here. The district court's denial of petitioners' request for a remand can be appealed immediately after the trial along with any other appealable issues in the event petitioners do not

prevail on the merits. The stay previously entered shall remain in effect until 10 days after the date of this order.

Accordingly, the petition for writ of mandamus is DENIED.

APPENDIX E — ORDER OF THE UNITED STATES SUPREME COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, ON MOTION FOR SUGGESTION OF REMAND DATED FEBRUARY 6, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

92-MD-940-CIV-ORL-3L23

HONORABLE PETER HILL BEER

IN RE CARBON DIOXIDE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES
TO ALL ACTIONS

ORDER ON MOTION FOR SUGGESTION OF REMAND, OR, IN THE ALTERNATIVE, FOR TRANSFER

This matter came on for hearing on February 6, 1996, on the Mississippi Individual Plaintiffs' Motion for Suggestion of Remand, or, In the Alternative, Transfer to the Southern District of Mississippi, which was joined in and adopted by the California plaintiffs to the extent they seek transfer to the Northern District of California, and the Court, having heard argument of counsel and being fully advised in the premises, finds that said Motion should be DENIED. It is, therefore,

ORDERED AND ADJUDGED that said Motion is DENIED.

DONE AND ORDERED this 6th day of February, 1996.

s/ Peter Beer
DISTRICT JUDGE PETER HILL BEER

APPENDIX F — EXCERPTS OF HEARING BEFORE THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, DATED FEBRUARY 6, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MULTI DISTRICT LITIGATION #940

IN RE: CARBON DIOXIDE INDUSTRY
ANTITRUST LITIGATION

ORLANDO, FLORIDA
FEBRUARY 6, 1996

—

EXCERPTS OF HEARING

BEFORE THE HONORABLE PETER J. BEER
UNITED STATES DISTRICT COURT JUDGE

* * *

[9] * * *

THE COURT: Wait a minute. I had said if [10] you decided to file a writ it should be done by the end of business today.

MR. ALLRED: Yes, your honor.

THE COURT: I certainly have not ordered anybody the file anything.

MR. ALLRED: To use better language, your honor, you gave use permission to file a writ and said if we were to it, do it by the end of today, and so —

Appendix F

THE COURT: Yes.

MR. ALLRED: It was our judgment we needed a definitive ruling from your honor on these several motions and we would like to have a transcript of this proceeding to send forward as soon as practicable.

We do have a draft of the writ, but it is based upon the facts and rulings of the court here, which is essentially the effect of what was done yesterday, but not on the record.

THE COURT: Well, I don't object to that at all. I think that that may be a more orderly way to address it and that's okay with me.

So, why don't you all, as the moving parties with respect to your motions, just go ahead and make your motions, substantiate them in what [11] ever way you feel is consistent —

* * *

[12] * * *

I would like to say to the court that we have several matters before the court for the record.

* * *

We have a motion for suggestion of remand, or in the alternative, transfer to the Southern District of Mississippi and a very short memorandum on that.

We have an objection to jurisdiction and venue in this case.

Appendix F

* * *

We have a motion to reconsider the court's so-called commitment and ruling on the writ transfer of the Mississippi plaintiffs to the cases to the Southern District of Mississippi.

* * *

[13] * * *

Secondly, or lastly, your honor, we would move the court if this is not cumulative to our other motions for transfer of this case pursuant to Twenty Eight U.S.C. Fourteen Zero Four A, to the Southern District of Mississippi.

* * *

[20] * * *

Now if the court please, the other sector of this matter is what transpired yesterday.

We, of course, have been contending from the get go, and we continued to contend yesterday, and we continue to contend today, that we want to be in Mississippi.

I recall, your honor, the first thing that happened as I was standing here, and your honor was [21] speaking to Mr. Wittmann and others, and I believe your honor had inquired of someone, whether the settlement that was in prospect with Mr. Freeman, and the remaining defendant would dispose of the whole case, and Mr. Wittmann said something about well, it would except for the Allred Group and California. Your honor said that won't be a problem, I will send them back to Mississippi.

Later that morning the deputy came into the courtroom and informed us that your honor would definitely do that rather than making it preliminary indication.

* * *

Later the deputy came out and said that is now definite, the court sent me out here to tell you all that rulings about going to Mississippi are going to be held firm.

* * *

Now, from what we learned after going into [22] chambers when we asked your honor later the defendants came in and apparently confected a settlement between Mr. Freeman and his plaintiffs, and one of the defendants, or all of them, I don't know who was cooperating in it at this moment, and they asked your honor to approve a settlement between Freeman that was acceptable to Freeman, and therefore advantage to Freeman, and therefore in his clients best interest, based upon a commitment that you would reverse your ruling that you had announced in this court upon which we relied.

THE COURT: I think you have given a little bit more of a formal stamp then is really the case, but there's isn't any doubt the correctness of your statement that I had indeed said essentially what you have quoted, which is that I would manage that aspect of the matter in the — basically the way that you have just described, so the only thing that I think the court ought to know and the record ought to know is that this never was formalized in anyway.

On the other hand, I did feel an obligation to ask the courtroom deputy to pass that word back to you pretty much the way you have just described it.

[23] Now, I am not a devious persons, that was not with any malice of forethought or calculation or waiver, it was an effort to keep everybody current with where I was thinking in terms of the overall management of what I guess is the most complicated set of settlements that I have run into in the time I have been around, so your definition of what transpired is entirely accurate.

The only thing that isn't perhaps totally accurate, as far as I am concerned, is the formal significance that you give it when there wasn't any formal significance. It was simply an effort on my part, through A, the most helpful person that I have had working with me in this matter, that the clerk of court, to keep you all posted about what was going on in terms of my management of it, didn't even occur to me that it had any affect in terms of other factors, but simply that you all should know what I was thinking.

When the matter was brought to my attention in terms of the conditional acceptance of the settlement, my feeling was well, okay, you haven't been able to bring much to the actual negotiations because they are really over your head, I am saying to myself, but this is something that [24] perhaps you can do to move the matter to a conclusion as far as this situation is concerned.

To tell you the truth, I wasn't even thinking in terms of what was later, the impact that you all feel was visited upon you, and I can understand that.

Appendix F

As I told you yesterday, given the whole scenario, I would do the same thing again, but I understand your frustration a good deal better then I did when I first was trying to move us along towards a resolution of the whole case.

So, there's no fault finding with respect to you accuracy in reporting the event.

The only thing I think is perhaps necessary to clarify is that I didn't perceive it then nor now to be some sort of formal ruling. It was a signal to you all where I though I was going to be heading with this.

* * *

[25] * * *

The facts, though, are that while your honor was in the frame of mind and as innocent of ill motive, as you have said, I don't believe that same can be said of the defendants who entered into this.

If the court please, they knew all there was to know about the case and about the posture of this settlement, while your honor has indicated that you did not.

In that posture, if the court please, they came into that room and traded Mr. Freeman a lay down on this, on our going back to Mississippi, which they have been actually told was of tremendous benefit to us and we valued it.

* * *

Appendix F

[26] * * *

. . . Also, if the court please ,that it was a deal in this posture, there were two parties before your honor asking for a settlement, the Freeman opt-out plaintiffs and one of the defendants.

The defendants said we will pay the money, which Freeman contends is in his favor, beneficial to him, if you, your honor, will take something away that you have preliminarily indicated under the circumstances that you have described to the [27] Mississippi plaintiffs.

THE COURT: No, that was not the context. And it's important for you to know the context.

The defense counsel never even went into taking something away.

The whole discussion was predicated on an observation which I found to be perfectly acceptable, that a great amount of money was being paid in the settlement, a huge amount of money had been expended in connection with the litigation process, and the one thing that the defendant required in terms of the management of the matter at that point in time was that it be — that it all be resolved.

There wasn't any — there wasn't even a discussion about venue or anything else, it was simply that it all be resolved, i.e., that this be the forum, that this be the place of resolution of the balance of the case. That was the entirety of their contentions to me.

And I thought that that was okay under the circumstances. My feeling was well, if I can bring that to the process, okay, I will do it.

It did occur to me that even at that moment in time, and I discussed it even then with [28] the clerk of court, it would probably require some delay.

* * *

THE COURT: I never even at the sort of high water mark of my improprieties, if indeed they were that, had the notion that you would be thrust into trial at one thirty yesterday afternoon.

It was then and still is my feeling, as clerk, and I discussed this morning, the obvious [29] necessity for some time to be available to you.

MR. ALLRED: Thank you. The point being in making that requirement of the settlement the defendants did ask you honor for somewhat of a commitment, I believe that was words your honor used, we would be put to trial here which was contrary to the preliminary indication you asked the clerk to announce to us earlier.

THE COURT: Actually it was not — I didn't think the emphasis was as much quote here unquote, as it was resolved in these proceedings; that they simply could not willingly participate in a whole new set of lawsuits.

* * *

[37] * * *

THE COURT: Well, you know, I have to confess my ignorance about the process in terms of what I need to sign off on.

Is there anything that you need from me before it goes?

MR. ALLRED: I need orders on all these motions, and I need your honor's indulgence, at least to let me see if I could talk the reporter into giving a daily transcript of this hearing.

THE COURT: Well, again that's something I have to leave up to you and him. But okay, well, I will just kind of consistent with your request, I [38] will just say you got to get it all done before the close of business tomorrow.

* * *

[39] * * *

MR. SEIGEL: Judge, for the record, Mel [40] Segal on behalf of the California Plaintiffs.

And basically I adopt Mr. Allred's presentation in this matter.

Of course, as your honor can see, we have already joined all their motions with the exception of the one motion regarding Mr. Freeman's settlement.

* * *

[58] * * *

Now, as far as the writ, the application to multi district panel, etc., that's really something that I don't think I have much control over or say about.

Appendix F

Certainly this record now contains every bit of information that either the Circuit Court of Appeal or the panel on multi-district litigation would want from me, because the exchange that in Mr. Allred and I have had essentially describes that, and I don't think it needs to be further enlarged upon.

I will say one other thing about the — let me see if that takes care of the actual existent motions.

MR. ALLRED: For the record, may I ask the court for a specific ruling on these motions, since they will go up.

THE COURT: Yes. I will grant the motion for a continuance and reset the case for trial in this court at nine a.m. on Tuesday, February 20.

I will, at this time, deny the plaintiff's objection to jurisdiction and venue, for the reasons already stated.

I will deny the motion to set aside the [59] preliminary settlement agreement.

I will deny the motion for remand, or in the alternative, transfer to the Southern District of Mississippi.

And the same with respect to the — what is the Middle District of — Northern District of California.

MR. SEIGEL: Northern District of California.

THE COURT: I think that covers it. Anything else?

MR. ALLRED: There was one more. It was the motion to reconsider court's commitment and ruling on the retransfer.

THE COURT: To the extent that it is necessary, the court will deny that motion simply to complete the record, for the reasons that have already been stated.

* * *

APPENDIX G — MOTION FOR JUDGEMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION FILED APRIL 4, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

92-MDL-940

HONORABLE PETER HILL BEER

IN RE CARBON DIOXIDE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE FOR A NEW TRIAL

The Mississippi and California Plaintiffs move the Court, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, for judgment as a matter of law, or in the alternative, for a new trial. As grounds for this motion, Plaintiffs would show:

1. The Court was without authority to hear this case, in that:

a. No order was ever entered transferring this case to the Middle District of Florida for any purpose other than pre-trial proceedings.

b. No motion to transfer the action to the Middle District of Florida for all purposes was ever filed, nor was any consideration given to the propriety of such a transfer.

c. For the reasons stated in Plaintiffs' various motions objecting to jurisdiction and venue.

2. The Court erred in denying Plaintiffs' Motion for Suggestion of Remand or for Transfer, in the following respects:

a. The Court has acknowledged facts which establish that there was an improper *ex parte* communication between counsel for BOC and the Court, which resulted in the Court's making a "commitment" to resolve the transfer or remand issue in favor of Defendants and keep the cases in Florida;

b. The Court summarily denied Plaintiffs' motion to remand or transfer, without giving any consideration to the appropriate factors; and

c. For the reasons stated in Plaintiffs' Motion.

3. The Court erred in denying Plaintiffs, Motion for Recusal by failing to give any consideration to the appearance of partiality which followed from the Court's meeting with counsel for BOC ex parte and committing to keep the cases in Florida for trial. The Court's comments in ruling on the Motion for Recusal make it clear that the Court focused on whether he actually felt any bias or partiality, to the exclusion of any consideration of whether the appearance of partiality was present. Plaintiffs incorporate the grounds stated in Plaintiffs' Motion.

4. The Court erred in denying Plaintiffs' Motion for a Continuance, in that:

a. The Court pushed Plaintiffs to trial without allowing the Judicial Panel On Multidistrict Litigation to rule in Plaintiffs' pending motion for remand;

b. Plaintiffs were denied adequate time to obtain and schedule the presence of witnesses;

c. Plaintiffs were denied adequate time to make the adjustment from being prepared to present the testimony of only three witnesses to being prepared to put on proof of a nationwide conspiracy that spanned 25 years; and

d. For the reasons stated in Plaintiffs' Motion.

5. The Court erred in its instructions to the jury, in the following respects:

a. The Court refused to give requested pretrial instructions, leaving the jury with no guidance from the Court on what to look for in the evidence;

b. The Court's instructions to the jury at the close of the case were erroneous, misleading and unfairly stacked in favor of the Defendants, in that the instructions:

(i) Did not instruct the jury on the meaning of the terms "agreement," "price-fixing" or "customer allocation," all of which have special meaning under the antitrust laws, leaving the jury to resolve the case based upon a layman's understanding of the meaning of those terms;

(ii) The Court's failure to define the terms "agreement" and "price-fixing" was exacerbated by the Court's

statements to the venire during *voir dire*, to wit: that the plaintiffs contended that "the Defendants in the came have gotten together to set prices of liquid carbon dioxide;" and that the plaintiffs had the burden of proving that the defendants entered into an "arrangement to fix the price, and keep it fixed among themselves with respect to this product," and that these statements told the jury that Plaintiffs had to prove that the prices were fixed in the sense that they were set at a certain level by agreement and kept there by agreement, which is neither an accurate statement of the law nor an accurate statement of the contentions of Plaintiffs; and

(iii) The erroneous impression created by the Court's comments preceding *voir dire* could have been eliminated by the Court's giving Instructions P-1 and P-2;

c. Told the jury that certain actions proven to have been taken by the defendants were not illegal, without also instructing the jury that while those actions were not in themselves illegal, they could be taken by the jury as circumstantial evidence that Defendants had entered into an illegal agreement;

d. Improperly instructed the jury as to the burden of proof in that the jurors were told that each Plaintiff had to prove every element of its case against each Defendant, and the possibility of confusion from this instruction was greatly enhanced by the Court's Special Interrogatories, which asked the jury to determine whether McCarty had proven that Airco engaged in a conspiracy to fix prices and/or

allocate customers, while the jurors could very well have believed that they could find for the plaintiffs only if they felt that the evidence adduced by a single plaintiff was sufficient to prove a particular defendant's participation in a conspiracy.

6. The Court erred in submitting the case to the jury on the special interrogatories proposed by Defendants, and in refusing to submit the case on the special interrogatories prepared by Plaintiffs, in that:

a. The interrogatory used by the Court was unduly complicated and misleading, in that it required the jury to find that each individual Plaintiff had proven each element of its case against each individual Defendant; and

b. The interrogatory proposed by Plaintiffs would have asked the jury simply whether the existence of a conspiracy had been proven; whether each Defendant had been shown to have participated in that conspiracy; and whether each Plaintiff had shown injury caused by the operation of the conspiracy.

7. The Court denied Plaintiffs their rights under the Due Process Clause, to fully contest the issues and abused its discretion by:

a. Arbitrarily limiting Plaintiffs to five days to put on their case, which resulted in Plaintiffs' being required to cut some witnesses entirely, resulting in the lose of their testimony and a limitation of Plaintiffs' ability to get documents into evidence, while absent such a time limitation, Plaintiffs could have called all of the witnesses for whom witness

statements were filed by Plaintiffs, which statements are of record, and who were also listed in the Pretrial Order, which is of record;

b. Refusing to modify the time limitation ruling when it became apparent that Plaintiffs had not been able to put on a complete case, despite Plaintiffs' exercise of all due diligence to meet the Courts' arbitrarily imposed deadline;

c. Refusing to allow Plaintiffs to present testimony in keeping with the various proffers made, as shown in Exhibit A;

d. Ruling that Plaintiffs' witnesses could not testify to anything other than what the Court considered to be facts;

e. Applying the rules of evidence strictly against Plaintiffs, but very leniently as to Defendants:

(i) Prior to trial, in response to Defendants Motion in Limine regarding the testimony of Dr. Charles Dennis, the Court ruled that Dr. Dennis would not be allowed to testify based on what he had read in documents produced by Defendants unless every document he purported to rely upon was already in evidence;

(ii) During trial, the Court allowed Defendants to put on the testimony of Kent Masters regarding accounts lost to or gained from the other defendants, even though his testimony was based on a review of documents which were not in evidence, and which were not designated as exhibits in the pretrial order; while in fact, many of the documents on which he

relied were the business records of companies other than his employer, including such companies as Coca-Cola Enterprises and Anheuser Busch;

(iii) During trial, the Court also allowed Carol Gorski to testify for Defendant Liquid Air Corporation that Liquid Air had lost certain accounts to other Defendants and taken other accounts from other Defendants, when it was clear that her testimony was based on a review of documents not in evidence, rather than on her own personal knowledge;

(iv) The Court repeatedly, and often without any objection from Defendants, cut off any answer from Plaintiffs' witnesses which involved any sort or mental impression, interpretation or explanation, and refused to allow Plaintiffs to cross-examine Defendants' witnesses as to the meaning of evidence or events;

(v) The Court applied a strict and very narrow interpretation of Plaintiffs' witness statements and a very broad and liberal interpretation of Defendants' witness statements in determining whether testimony offered at trial should be excluded on the ground that it was not covered in the witness statements;

(vi) The Court cut off the testimony of Plaintiffs' witnesses and directed them that they could not give information about policies, procedures, etc. followed by the Defendants, unless they could give specific instances, with dates, and all of the particular; but allowed Defendants witnesses to testify to pure hearsay, so long as they first testified that they had personal

knowledge of what they were about to say, even though their testimony clearly showed that they did not know the legal meaning of the term personal knowledge and the information they were conveying was clearly hearsay;

(vii) The Court applied an overly broad view of what constituted leading questions to Plaintiffs' direct examinations, but allowed Defendants almost free rein to lead their witnesses;

(viii) The Court went beyond what in required by the Rules of Evidence in restricting Plaintiffs' redirect examination; and

(ix) Examples of the types of rulings listed above are contained in Exhibit B.

8. The Court erred in regard to rulings on the admissibility of documentary evidence, as follows

a. The Court refused to admit business records produced by Defendants unless there was a witness on the stand who admitted familiarity with the document, even though there was no objection to the authenticity of the document and the documents contained admissions of a party opponent and were, therefore, not hearsay;

b. The Court ruled that Plaintiffs could not introduce any documents through Defendants' witnesses on cross-examination, when the Court was of the opinion that the evidence was something that should have been introduced in Plaintiffs' case in chief, even though the Court was well

aware that Plaintiffs had been subject to an arbitrary time limitation in presenting their case in chief;

c. The Court allowed Defendants' witnesses to repeatedly deny any knowledge of any conspiracy to fix prices or allocate customers, and to repeatedly deny that any allocation of customers was discussed at the Compressed Gas Association meetings, but would not allow Plaintiffs to question those witnesses about, or otherwise introduce any evidence concerning, the fact that Canadian subsidiaries of these same companies had pleaded guilty to conspiring to fix prices and allocate customers, and had admitted that the conspiracy was set up during CGA meetings in the United States;

d. The Court allowed Defendants to make repeated references to competition that occurred in 1992, but refused to allow Plaintiffs to introduce evidence regarding the Canadian guilty pleas and the filing of the class action complaint which the jury could well have believed explained all of the competitive acts which occurred in 1992;

e. The Court allowed Defendants to cross-examine Plaintiffs' witnesses concerning their not having brought the allegations of conspiracy to anyone's attention earlier, and to argue that point to the jury in closing, without allowing testimony concerning the witnesses having been granted immunity from prosecution;

f. The Court erred in admitting over Plaintiffs' objections the following exhibits: D-7; D-241; D-242; D243; D-244; D-245; D-651; D-905; D-906; D-908; & D-909; and

g. The Court erred in refusing to admit the following Plaintiffs' exhibits; P-6; P-7; P-8; P-9; P-12; P-13; P15; P-17; P-18; P-22; P-24; P-27; P-29; P-30; P-31; P-32; P-33; P-34; P-35; P-39; P-45 through P-54; P-66; P-74; P-75; P-111; P-149; P-151 through P-163; P-166; P-175; P176; P-189; P-192; P-194; P-198 through P-201; P-210 through P-231; P-265 through P-274; P-301 through P-308; P-381; P-383; P-384; P-391; P-394; P-395; P-397.

9. The Court's constant comments on the testimony and documentary evidence during the trial, as well as hostile and derogatory remarks directed at Plaintiffs' counsel poisoned the jury against Plaintiffs and denied Plaintiffs a fair trial, and examples of such conduct by the Court are attached as cumulative Exhibit C to this motion, an follows:

a. Although the Court was aware that Plaintiffs had alleged and were attempting to prove the existence of a nation-wide conspiracy entered into by the only three companies engaged in marketing CO2 on a nation-wide basis, and the Court wan, therefore, required to allow evidence of actions taken by the Defendants which tended to prove the existence of a conspiracy, regardless of where those actions occurred, the Court repeatedly interrupted Plaintiffs' presentation of evidence to state in the presence of the jury that evidence of what went on in areas outside Mississippi and California was not relevant and that the jury did not want to hear any of the details of those incidents;

b. The Court went far beyond what was required to rule on an objection and control the flow of evidence and made repeated comments that appeared to be intended to denigrate Plaintiffs' counsel and Plaintiffs' case before the jury;

c. The Court repeatedly and gratuitously offered its opinion that Plaintiffs had not proven anything with regard to the existence of a conspiracy;

d. The Court repeatedly, in the presence of the jury, criticized the order in which Plaintiffs' counsel presented evidence, even though the Court was well aware that he had forced Plaintiffs to trial without adequate time to line up witnesses, and even though the Court had denied a motion for continuance which was based upon the precise ground that the witnesses who knew the most about the conspiracy would not be available to testify until near the end of Plaintiffs' case if no continuance were granted;

e. The Court's comments in making rulings unnecessarily wasted much of the precious little time the Court had arbitrarily allotted Plaintiffs to put on their case; and

f. There were many other instances of abuse of the judicial prerogative to comment and guide the course of trial which are not specifically catalogued in the foregoing list.

10. The Court's obvious bias against Plaintiffs and Plaintiffs' counsel during the course of the trial affected the Court's evidentiary rulings and must have had an impact on the jury's view of Plaintiffs, Plaintiffs counsel and their case.

11. The Court erred in granting Defendants' motions in limine as to expert testimony regarding competition in the CO2 marketplace in Mississippi; any reference to the Canadian guilty pleas, consent decree, assertion of the Fifth Amendment privilege against self-incrimination by defense witnesses during discovery, and the immunity from prosecution granted to Plaintiffs' witnesses.

12. Court abused its discretion in refusing to allow Plaintiffs to use summary charts in closing argument.

13. The Court's denial of a continuance, granting of Defendants' motions in limine, rulings on admissibility of evidence, unwarranted and abusive comments concerning Plaintiffs' counsel and their case, unwarranted and biased comments about the evidence, instructions to the jury, and jury interrogatory, all as discussed above, combined to deny Plaintiffs the right to a fair trial.

14. The Court erred in limiting the direct examination of Plaintiffs' witnesses on the alleged basis of the leading nature of questions and/or questions without a predicate to show competence and relevance.

15. The Court erred in allowing the Defendants, in a directly contradictory and discriminatory way, to elicit direct testimony by leading questions, without any predicate. In effect, the rules were applied in a strict and illiberal way to the Plaintiffs to preclude Plaintiffs' evidence improperly and were not applied to the Defendants at all or were applied in a liberal and permissive way. This tainted the evidence and the jury.

16. The Court erred in making hostile, angry, unjustified and unfounded comments upon the evidence, the witnesses, the testimony of the witnesses, counsel, the conduct of counsel and related matters so as to severely prejudice Plaintiffs, Plaintiffs' witnesses and Plaintiffs' counsel before the jury.

17. The Court erred in excluding the testimony of Plaintiffs' witnesses McNamee, Welsh, and other Plaintiffs' witnesses about the habits, customs, practices, "ground rules",

"gentlemen's agreements", and other prior customs, acts and practices of the Defendants, all of which were admissible.

18. The Court erred in refusing to admit into evidence Defendants' business records which were stipulated to be authentic and which contained relevant evidence, much of which was relevant as admissions against interest.

19. The Court erred in refusing to allow Plaintiffs to adduce relevant evidence on Defendants' case in chief and/or during cross-examination.

20. The Court erred in refusing to allow Plaintiffs to offer evidentiary documents on Defendants' case in chief and/or during cross-examination.

21. The Court erred in refusing all of Plaintiffs' requested jury instructions or requests to charge the jury.

22. The Court erred in its charge to the jury in that the Court gave jury instructions which were abstract and failed to furnish any guide to the jury.

23. The verdict of the jury and the judgment of the Court predicated thereon are against the overwhelming weight of the evidence.

24. There is no evidence, or insufficient evidence to amount to substantial evidence, to support the verdict of the jury and the judgment predicated thereon.

25. The findings of the jury in response to the special interrogatories to the jury are against the overwhelming weight of the evidence.

Appendix G

26. According to the uncontradicted evidence by which the Defendants are bound, the Plaintiffs are entitled to a verdict and judgment as a matter of law.

27. Plaintiffs assign the error of the Court in failure to grant the Plaintiffs' requests for a directed verdict or peremptory instruction. Plaintiffs hereby renew such requested peremptory instruction.

28. Plaintiffs assign as error the findings and verdict of the jury in that there is no evidence, or insufficient evidence, to support a verdict for Defendants.

29. The verdict of the jury, and the Judgment of the Court predicated thereupon, are not supported by evidence or substantial evidence.

30. The verdict of the jury, and the judgment predicated thereon, are against the overwhelming weight of the credible evidence.

31. Plaintiffs assign as error that the jury erred as a matter of law in failing to find that the Defendants acted in concert or conspiracy and that such conspiracy proximately contributed to the cause of Plaintiffs' damages. The jury's finding and verdict, and the judgment predicated thereon, are not supported by the evidence or the substantial evidence. The Plaintiffs assign as error that the jury erred as a matter of law in its answer to special interrogatories that Defendants did not form a concert or conspiracy as against the Plaintiffs.

32. The uncontradicted evidence establishes that Defendants committed a conspiracy to fix prices and/or allocate customers as against the Plaintiffs.

Appendix G

33. Plaintiffs renew all of the several objections of the Plaintiffs made during the Defendants' case in chief and during the Plaintiffs' case in chief to evidence adduced by the Defendants and assign the error of the Court in overruling and denying all of said objections.

34. Plaintiffs assign as error the several objections of the Defendants sustained by the Court and the error of the Court in excluding evidence offered by the Plaintiffs on the Plaintiffs' case-in-chief and on the Defendants' case-in-chief upon objection of the Defendants.

35. Whether enumerated herein or not Plaintiffs assign the error of the Court in overruling and denying the several objections and motions of the Plaintiffs filed in advance of trial after the collusive settlement between BOC Group and the Freeman "opt-out" Plaintiffs was announced.

Respectfully submitted this 4th day April, 1996.

By: s/ Michael S. Allred
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Appendix G

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ATTORNEYS FOR PLAINTIFFS IN THE B. C. ROGERS CASE

APPENDIX H — LETTER FROM KENNETH A. RUTHERFORD TO OFFICE OF THE CLERK RE: *B.C. ROGERS PROCESSORS, ET AL. V. BOC GROUP, ET AL.*, APPEAL DOCKET NO. 96-2704

ALSTON • RUTHERFORD
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December 31, 1997

Office of the Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *B.C. Rogers Processors, et al. v. BOC Group, et al.*,
Appeal Docket No. 96-2704

Dear Sir or Madam:

This case has been set for oral argument on January 15, 1998. In November 1997 the United States Supreme Court heard oral argument in a case styled *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation; Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 102

Appendix H

F.3d 1524 (9th Cir. 1996), *cert. granted,* __ U.S. __, 117 S.Ct. 1818, 137 L.ed. 2d 1026 (1997).

One of the issues addressed by this case is whether or not a transferee judge for pretrial purposes in multidistrict litigation has jurisdiction to transfer the case to himself for trial. A decision that the transferee court lacked jurisdiction to try the case would be controlling in this case.

Another issue in the case is whether the appellant in that case waived its right to request a remand for trial because it did not file a motion for remand with the Multidistrict Panel. The Appellants in this case did file a Motion for Remand with the Multidistrict Panel. (Dkt. #1000). This Motion was not ruled upon by the Panel until after the trial was concluded, when it was denied as moot by the Panel.

Sincerely yours,

s/ Kenneth A. Rutherford
Kenneth A. Rutherford

Office of the Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303
December 31, 1997

KAR/slj
cc: William G. Schopf, Jr., Esq.
John E. Burke, Esq.
Michael J. Abernathy, Esq.
Melvyn L. Segal, Esq.

No. 97-1777

Supreme Court, U.S.
FILED
JUN 1 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

B.C. ROGERS PROCESSORS, INC., B.C. ROGERS POULTRY, INC., CHOCTAW MAID FARMS, INC., FOREST PACKING COMPANY, INC., MARSHALL DURBIN, INC., MARSHALL DURBIN FOOD CORPORATION, MARSHALL DURBIN POULTRY, INC., MARSHAL DURBIN OF TUPELO, INC., AND MOHAWK PACKING COMPANY,

Petitioners,

v.

THE BOC GROUP, INC., LIQUID AIR CORPORATION AND LIQUID CARBONIC INDUSTRIES CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS J. HIGGINS
Counsel of Record
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QUESTION PRESENTED

Whether the Mississippi and California Opt-Out Plaintiffs ("Petitioners") waived their objections to a trial in the United States District Court for the Middle District of Florida by (i) agreeing during pretrial proceedings and in the Final Pretrial Order that this action would be tried in the Middle District of Florida, and (ii) failing to object to venue until the day the trial was scheduled to begin?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are correctly described in the Petition.

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OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed *per curiam* the decision of the Middle District of Florida without opinion. This affirmance is reported *sub nom. State of Florida v. Liquid Air*, 136 F.3d. 139 (11th Cir. 1998). The unpublished orders of the Middle District of Florida are included in the Appendix to the Petition.

STATEMENT OF JURISDICTION

Certiorari is not appropriate because the Eleventh Circuit's decision does not conflict with an applicable decision of this Court. Sup. Ct. R. 10(c).

STATUTE INVOLVED

The statutory provision involved in this response is 28 U.S.C. § 1406(b), which provides: "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose a timely and sufficient objection to venue."

STATEMENT OF THE CASE

The history of this case shows Petitioners did not interpose a timely and sufficient objection to venue. On the contrary, Petitioners repeatedly consented to venue.

On April 22, 1992, the State of Florida filed a civil antitrust suit against Liquid Carbonic Industries Corporation, The BOC Group, Inc., and Liquid Air Corporation ("Respondents") in the United States District Court for the Middle District of Florida ("District Court" or "Middle District of Florida"). Thereafter, over a dozen "tag-along" actions were filed in the District Court and elsewhere. The

California Plaintiff filed suit in the United States District Court for the Northern District of California and the Mississippi Plaintiffs filed suit in the United States District Court for the Southern District of Mississippi.[1] In 1992, the Judicial Panel on Multidistrict Litigation transferred all tag-along actions to the Middle District of Florida for coordinated pretrial proceedings. (Pet. at 4).

Petitioners filed amended complaints in the Middle District of Florida. On October 20, 1993, the California Plaintiff filed its First Amended Complaint in that district, asserting jurisdiction and venue were proper under 28 U.S.C. § 1331. (R. 737-16). Likewise, on April 1, 1994, the Mississippi Plaintiffs filed their First Amended Complaint in the Middle District of Florida. (R. 965-13).

At a pretrial hearing on January 12, 1994, the District Court set a trial date for September 1995 in Orlando, Florida. (R. 2-312). In May 1995, the District Court rescheduled the trial to February 5, 1996 in Orlando. (R. 3-603-1). The District Court also set a final pretrial schedule including the dates for designating trial witnesses and serving final expert reports. Petitioners' counsel, who were present at the hearing, did not object to venue or suggest the cases should be transferred. (*Id.*).

Throughout the final pretrial stage, Petitioners continued to prepare for a trial in Orlando. (R. 10-918-1; R. 10-919-1; R. 10-920-1; R. 10-921-1). The parties submitted final expert reports in May 1995. In June, the parties exchanged trial witness summaries, including 18 witnesses

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[1] Counsel for the California Plaintiff had previously filed suit on behalf of Foster Poultry Farms Co. ("Foster Poultry") in the Middle District of Florida. For this reason, Foster Poultry is not a party to the Petition. (Pet. at ii).

affiliated with Petitioners. The final round of pretrial discovery, including depositions of Petitioners' employees, ended in November 1995.

During this time, Plaintiffs never objected to a trial in Orlando. In fact, the Mississippi Plaintiffs opposed The BOC Group, Inc.'s motion for separate trials. (R. 3-640-8). In their brief, the Mississippi Plaintiffs argued that the trial should be "consolidated," that no prejudice would result from a consolidated trial, and that separate trials would not serve the "goals of expeditiousness [and] economy." (*Id.*)

On August 9, 1995, the District Court ordered the parties to prepare a pretrial order by December 7, 1995. (R. 3-641). In the Final Pretrial Order, which all parties signed, Petitioners consented to the District Court's exercise of personal jurisdiction and agreed venue was proper in the Middle District of Florida:

> *This Court has jurisdiction of the matters complained of* under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 16 and 26). It also has jurisdiction under 28 U.S.C. § 1337. The Court has supplemental jurisdiction over Florida's state law claims pursuant to 28 U.S.C. § 1367. *Venue is proper under 28 U.S.C. § 1391.*

(R. 3-740-25) (emphasis added).

On December 11, 1995, the District Court approved the Final Pretrial Order, confirmed the trial date of February 5, 1996 in Orlando and set hearings on pending motions. (R. 4-771). The District Court also set a date for the submission of motions *in limine* and ordered that it would hear those motions in Orlando on February 2, 1996, the

Friday before trial. *Id.* Petitioners' counsel participated in this hearing and did not object to jurisdiction or venue.

By February 1, 1996, Petitioners and the other parties had arrived in Orlando for trial. On February 2, the District Court held a day-long hearing on various trial-related motions. (R. 11-953). Petitioners' counsel participated in this hearing and again did not object to venue. Petitioners also submitted proposed jury instructions and objected to Respondents' proposed jury instructions. (R. 11-944).

In the days before trial, various parties settled. Ultimately, the last group of plaintiffs other than Petitioners resolved its claims on February 5, the morning trial was scheduled to begin. (Pet. Brief at 5). Later that morning, Petitioners and Respondents appeared before the District Court to select a jury and present opening statements. Upon learning they were the only remaining plaintiffs, Petitioners for the first time moved the District Court to transfer the cases to Mississippi and California.[2] (R. 12-991). Their

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[2] Hoping to free ride on the work of the other opt-out plaintiffs, Petitioners did little to prepare for trial. In response to Petitioners' writ of mandamus, Petitioners' co-plaintiffs documented this strategy:

> In the fall of 1993, shortly after [P]etitioners opted out . . . counsel for [P]etitioners were invited to participate in the discovery efforts that the State of Florida, the class and [certain opt-outs] had undertaken jointly to share costs, but [P]etitioners refused to pay their fair share of the joint costs. [Certain opt-outs] counsel made it clear at that time that [P]etitioners' decision meant that [P]etitioners were not entitled to share the work product of the other plaintiffs . . . . If [certain opt-outs]

motion was denied.[3] (Pet. App. E at 9a; R. 20-6-56). Petitioners then unsuccessfully sought a writ of mandamus in the Eleventh Circuit.

The trial finally began on March 5 and continued until March 21. After deliberating for less than three hours, the jury returned a verdict for Respondents. (R. 15-1062-1-27; R. 15-1063-1). Petitioners then sought appellate review. In their Eleventh Circuit briefs, Petitioners never claimed the District Court lacked jurisdiction or venue. Instead, they argued convenience:

> Plaintiffs do not contend that venue was not proper under Section 1391. The Middle District of Florida was a district in which

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> ha[d] a "vastly superior position with regard to control of the documents and witnesses" ([Mand.] Br. 20) . . . it was because of their trial preparation. Nothing prevented [P]etitioners from doing their own work. *In re B.C. Rogers, et al.*, No. 96-2179, Dkt. 2/22/96, at 3-4 (emphasis added).

[3] The District Court chided Petitioners after they claimed shock over a trial in Orlando on the date scheduled nine months earlier:

> So that the notion that some calamity has befallen you at my instance, and is sort of irredeemable, almost, is really not born[e] out by the fact that all of this is the result of circumstances that took place in about a two or two and a half hour span, at the most . . . .

(R. 20-32-34; R. 20-33-34).

> these cases could have been brought . . . . [B]ut . . . there are other districts where trial would be more convenient for the parties and witnesses.

(Pet. App. Reply at 13-14).

ARGUMENT

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *LEXECON*

As jury selection was about to begin, Petitioners for the first time moved to transfer their cases to the Southern District of Mississippi and the Northern District of California. Because Petitioners had agreed to a consolidated trial in the Middle District of Florida and waived any objections to jurisdiction or venue, the District Court properly denied this request. 28 U.S.C. § 1406(b); Fed. R. Civ. P. 12(h). In May 1995, the District Court ordered these cases would be tried in Orlando on February 5, 1996. During the intervening nine months, Petitioners never objected to the court's jurisdiction or venue. To the contrary, in the Final Pretrial Order signed by their counsel, Petitioners agreed that (i) the District Court had jurisdiction; and (ii) venue was proper in the Middle District of Florida. (R. 3-740-25).

Lexecon Inc. v. Milberg Wiess Bershad Hynes & Lerach, __ U.S. __, 118 S. Ct. 956 (1998), is substantially distinguishable. *Lexecon* involved the authority of a transferee court to transfer a case to itself for trial under 28 U.S.C. § 1407(a) where a party repeatedly objected to venue. It does not impact a court's power to try a case under 28 U.S.C. § 1406(b) where a party repeatedly consents to venue. Lexecon first moved for a Section 1407(a) transfer during discovery. The district court denied the motion. Lexecon then renewed its Section 1407(a) transfer motion after

discovery had concluded. The court again denied its motion, and Lexecon immediately sought relief in the Ninth Circuit. 118 S. Ct. at 960.

In contrast, Petitioners never sought a transfer before they were scheduled to start trial. Instead, they repeatedly consented to both jurisdiction and venue in the Middle District of Florida. They filed amended complaints in that district. They signed the Pretrial Order, consenting to venue in that district. They submitted jury instructions and filed motions *in limine* for a consolidated trial. And, on the day of trial, they walked into court ready to pick a jury and make opening arguments.

Lexecon does not affect waiver under Section 1406(b). In fact, *Lexecon* teaches "a statute is to be considered in all its parts when construing any one of them" and courts must apply the plain meaning of a statute. 118 S. Ct. at 962. Under the plain meaning of Section 1406(b), any party may waive venue, regardless of Section 1407:

> Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose a timely and sufficient objection to venue.

28 U.S.C. § 1406(b); *see also Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (venue is a privilege which may be waived). Given Petitioners' explicit waiver of any objection to venue, reconsideration by the Eleventh Circuit would be inappropriate.

Petitioners' last-minute objection to venue on the day of opening statements was not timely. *See W.A. Stackpole Motor Transp. v. Malden Spin & Dye Co.*, 263 F.2d 47, 50

(1st Cir. 1958) (objection to venue during trial was not timely under Section 1406(b)). By signing the final Pretrial Order, participating in the final pretrial conference, submitting jury instructions, and appearing in Orlando to conduct *voir dire* and opening statements, Petitioners repeatedly consented to the District Court's jurisdiction and venue. Petitioners' belated objections to jurisdiction and venue ring hollow in light of the history of this case -- and their own actions.[4]

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[4] Petitioners claim the District Court made a "commitment to defense counsel to resolve all of the cases in Florida." (Pet. Brief at 6). The court, however, unequivocally denied the existence of any such agreement or understanding:

> In fairness to everybody, including the record, there was no effort by anybody for any sort of quid pro quo. There was not any suggestion, or threat, or continuous signal that, if you send these cases back to Mississippi and California, we are not going through with this settlement. There was nothing more or less . . . than a statement that a great deal of expense had been incurred by coming down to Orlando to get ready to deal with this matter, that it was continuing to cause incredible expense, and inconvenience . . . . At no time -- and, indeed, I would have resented it if there had been a time, but at no time was I ever put in a position of being demanded of, or bargained with.

(R. 21-22) (emphasis added).

CONCLUSION

Lexecon does not apply. Petitioners did not "interpose a timely and sufficient objection to venue" as required by 28 U.S.C. § 1406(b). Petitioners expressly consented to venue in the District Court, thereby waiving any such objection. Accordingly, Respondents respectfully request this Court to deny Petitioners' Petition for Writ of *Certiorari*.

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